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The Extraterritorial Effect of Antimonopoly Law

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I. INTRODUCTION

Monopoly refers to the phenomenon whereby a specific person or enterprise accrues substantial profits by controlling the production and selling of a particular commodity. International monopolies occur when an enterprise gains control of a commodity's production and sales on a global scale. When capital becomes centralized and monopolies are formed in domestic markets, there is a strong likelihood that the monopoly will spread internationally. As a result, there will be global centralization of capital and international monopolization in which individual enterprises dominate more of the market and earn more profits.

To avoid the development of international monopolies, many countries have recognized the extraterritorial effect in antimonopoly case laws in order to protect and improve the comprehensive competitiveness of their native enterprises. Some examples of these antimonopoly laws include the U.S. Sherman Act, the 85th and 86th article of the European Treaty of Rome, and the 98th article of the German Law of Forbidden Competition. Countries design legislation to protect their own interests. The extraterritorial effect of antimonopoly laws thus has a significant history in many countries.

This article examines the extraterritorial effect of antimonopoly laws in the United States and European countries, discusses relative theories, and suggests ways of resolving conflicts between country-specific laws through an analysis of specific examples.

II. THE APPLICABLE OBJECT AND THEORETICAL BASIS OF EXTRATERRITORIAL EFFECT OF ANTIMONOPOLY LAW

Generally, a country's antimonopoly law only applies to that country's enterprises. However, given the changing shape of the international economy and the increasing intensity of market competition, monopolies are no longer the result of a single enterprise's practices. Changes in international production practices have resulted in unfair competition in international markets, and multinational monopolies have negatively affected native industries of many countries. In light of this new reality, many countries have begun to highlight the extraterritorial effect portion of their original antimonopoly laws as a way to resist and legally prohibit these new monopoly behaviors. This change raises several important questions regarding extraterritorial effects and antimonopoly laws. What are the particular situations related to the extraterritorial effect of antimonopoly laws? Moreover, what is the theoretical basis behind the extraterritorial effects? These questions of extraterritorial effects of antimonopoly laws need to be addressed during the legislative process.

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A. The Extraterritorial Effect of Antimonopoly Laws and the Multinational Monopoly

The extraterritorial effect of antimonopoly law mainly concerns the implementation of effects in extraterritorial regions, including the expansion of effects on individuals. Thus, the extraterritorial effect of antimonopoly laws relates chiefly to the behaviors of multinational monopolies, including cases where foreigners enter native markets and the direct and indirect effects their actions have on the native markets. There are three conditions that may characterize multinational monopoly behaviors: 1) behaviors by extraterritorial entities in extraterritorial areas that violate native antimonopoly law and negatively affect the native industry, 2) behaviors by extraterritorial entities in native areas that violate native antimonopoly law, 3) behaviors by native entities in extraterritorial areas that violate native antimonopoly law.²

B. The Theoretical Basis of the Extraterritorial Effect of Antimonopoly Laws

According to the traditional law of nations, all countries define the scope of their legal validity in the following way: territorial principle will be its basis, and personal jurisdiction and protectionism will complement the law to protect the sovereignty and interests of each country. Therefore, when defining the scope of validity for the extraterritorial effect of antimonopoly law, each country determines its jurisdiction according to these principles of international law and how they relate to antimonopoly behaviors. i.e. the principles of territory, personal jurisdiction, and protectionism.³

The principle of protectionism has the widest scope applicable to any antimonopoly law. According to the cardinal principles of international private law, the effects from personal jurisdiction and the principle of territory stem from place of act and nationality. The principle of protectionism stems from the desire to prevent the loss of native interest.

III. THE CONCRETE PRACTICE AND THEORETICAL EVOLUTION OF EXTRATERRITORIAL EFFECT OF ANTIMONOPOLY LAW

Through the legislative process, the U.S. legal system established the principle of effect, also called the principle of influence and result,⁴ in order to maintain its global economic supremacy. This principle, and how it was first applied to extraterritorial monopoly law, can be seen in the case of *America vs. the Aluminum Company of America*. Judge Learned Hand of the Second Circuit Court argued that his judgment was based on the common law, that is, “every country has the right to decide that the person, even without the citizenship of this country, cannot carry out any behaviors which will be accused in this country and bring negative results to the native area, even if the behaviors were done extraterritorially.”⁵ In this case, he argued that the Sherman Act could be applicable to all contracts by foreign enterprises in extraterritorial areas, as long as their behaviors affected American exports.

² S. CAO, STUDIES ON THE ANTITRUST LAW (1996).

³ L. Zhao & Z. Qiang, *Analysis of the Extraterritorial Effect of Antitrust Law*, HUBEI SOCIAL SCIENCE, 6: 74-75. (2003).

⁴ J. Wu & T. Kong, *The Extraterritorial Effect and Application Suggestion of Antimonopoly Law*, J. ANHUI VOCATIONAL COLLEGE OF POLICE OFFICERS, 4: 51-53 (2005).

⁵ *Id.*

Through this legal decision, the American judicial system established that the principle of effect originated from protectionism and was applicable to extraterritorial behaviors, that is, “as long as the behaviors affect the Americans and American interests, the American courts enjoy the jurisdiction to the monopoly and limited competitive behaviors, wherever the behaviors are practiced, including the extraterritorial areas.”⁶ Judge Hand went on to write, “if the defendant denies that his behavior is illegal, he would have to bear the burden of proving that he did not affect the wellhead trade in the United States.”⁷ This legal decision represents the initial establishment of the principle of extraterritorial effects in U.S. antitrust law.

According to the common principles of international private law, behaviors can refer to the *lex loci actus* and the places of act could be interpreted as place of process and place of result. In this way, each situation can be viewed in terms of a specific jurisdiction. The persons responsible for the behaviors could be outside of this jurisdiction and the territory jurisdiction would therefore not apply.

There are three possible consequences of this situation. First, the principle of effect would lead to one country interfering in other countries’ internal affairs, therefore violating the country’s sovereignty and the principle of sovereignty in international law. As one scholar writes:

transnational antitrust issue is the performance of intergovernmental conflict...it should be recognized that perhaps there is no international law that can be applied to resolve such conflicts. In this case, these issues should be resolved through consultation and negotiation. If a government resorts to the national law according to its own preferences and resolves the conflict in national courts, it is not the principle applied to law, but the principle of dressing in the cloak of the law to apply to the economic strength of power.⁸

Second, the application of principle of effect could cause jurisdictional conflicts among countries.

Third, the standard of the principle of effect could provide too much discretionary power to the law enforcement agencies and courts, which would thus increase the uncertainty of how antimonopoly laws are applied.

Given strong criticisms by other countries, the scope of validity defined in *Alcoa* was narrowed in the *Timber Lance* case in 1976. In this case, there was a proposed amendment to the principle of effect, which established the principle of proper jurisdiction in judicial practice. In addition, the *Antitrust International Implementation Guide*, released by the U.S. Department of Justice in 1977, provided that once foreign transactions “produce a significant and foreseeable consequence to an American business, those foreign enterprises are then subject to U.S. legal jurisdiction regardless of the occurrence place.”⁹ Later, in 1995, the *Antitrust International Operations Guidelines for the Implementation* further clarified the reasonable jurisdiction

⁶ *Exterritorial Criminal Enforcement of the U.S. Antitrust Laws*, The International Conference, APEC Competition Policy and Economic Development, (Dorsey ed., 2001).

⁷ *Id.*

⁸ J. S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CONNELL INT’L L.J. 195: 213 (1978).

⁹ DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (January 26, 1997).

principle by referring to it as the “international comity.” This new definition emphasized that specific circumstances and facts of each case should initially determine the application of the antimonopoly law, and that the Justice Department should initially consider the direct and substantial impact of the behavior on American business.¹⁰

The influence of free competition in America, along with the direct and causal relation between this influence and monopolies, resulted in the principle of proper jurisdiction. Looking forward, in order to avoid abusing this principle and relieve pressure on the extraterritorial application of antimonopoly law, courts should consider several issues before exercising the principle, including the principle of comity, the interest of the other countries, the nationality of the actors, the degree of influence on the other countries, the degree of foreseeable influence, and the potential conflicts that may result because of the jurisdiction.

However, this approach does not solve all the problems. Since the principle of proper jurisdiction only represents a small addition to the principle of effect, the above three consequences stemming from the principle of extraterritorial effects still remain. Additionally, this new principle creates a burden for the law enforcement agencies and courts. Finally, this new principle can lead to uncertain application of antimonopoly law, given that many interests and factors must be taken into account when law enforcement agencies and courts apply the principle.¹¹

A. The Practice and Evolution of Extraterritorial Effect of European Antimonopoly Laws

In Europe, the extraterritorial effect was implied in the 85th and 86th articles in the European Treaty of Rome and then expressed by the decision of the European Economic Community (“EEC”) Commission and the judicial cases decided by the European courts. Examples of these cases include the EEC commission’s decision in the cases of *Grosfillex* and *Bendix* in 1964, the European Court of Justice’s decision in the *American International Commercial Solvents Corporation* case in 1971, and the *Aniline Dye* case in 1972.

According to the judicial practice of European laws and courts, the European Union established three principles that would determine the extraterritorial effect of European competition law: the implementation approach, principle of economic entity, and effects doctrine.¹² The implementation approach covered cases in which an unfair contract was signed, and the contract would then be the object of EEC competition law as long as it was implemented in European countries. This principle was developed from the principle of territory under the traditional theory of international law. Since the jurisdiction derived from a country’s native sovereignty, it was easily supported and executed.

The principle of economic entity related to branch companies in European countries whose head offices controlled and managed the antimonopoly laws. When the branch companies

¹⁰ W.C. HOLMES & D.E. HOLMES DE. 2000. ANTITRUST LAW SOURCEBOOK FOR THE UNITED STATES AND EUROPE (2000).

¹¹ Z. Ni & Z. Wang, *Our Country Should Not Formulate Exterritorial Effect in the Antitrust Law*, THE LEGAL SYSTEM CONSTRUCTION AND RESEARCH 1;75-79 (2007).

¹² Y. HUANG, ON THE EXTERRITORIAL EFFECT OF ANTITRUST LAW (2006).

displayed monopolizing behaviors, the European law of antimonopoly would then be applicable to not only the branches, but also the extraterritorial head offices. The extraterritorial head offices would have the right to fight the jurisdiction of European antimonopoly law only when they had enough evidence to prove that the branch companies' economic behaviors were independent and not controlled by the head offices. This principle was similar to the theory of "piercing the corporate veil" through which native courts could link the behaviors of the branch companies to the head offices, provided the behaviors violated competition law. Therefore, the principle satisfied the traditional theory of international law and current economic development criteria, especially among the multinational companies. At the same time, there was an employer-employee relationship between the head offices and their branches. Therefore, the monopoly behaviors of branch companies could be interpreted as the behaviors of head offices.¹³

Finally, the effect doctrine, also called the principle of result place, was derived from the principle of territory and protectionism. The principle of territory included the place of process and place of result. The place of result was originally emphasized and, as long as it was native, the native government had jurisdiction. The European Union has exercised this principle in practice, even though this practice was never formally admitted.

In cases of antimonopoly, the European Union often preferentially applies the first two principles, and the effect doctrine has been applied only when the others could not provide a strong enough explanation of the extraterritorial effect of antimonopoly. The European Union had tried to distinguish the place of result from the effect doctrine; however, in reality, the principles are very similar.

B. Similarities and Differences Between Extraterritorial Effects of Antitrust Law in the United States and Europe

There are many similarities between the extraterritorial effects of antitrust law of the United States and Europe. First, the European Union's extraterritorial effects of antitrust law are deeply influenced by U.S. experiences implementing these laws. The EU courts have attempted to amend the effect principle in order to avoid the difficulties faced by the U.S. case practice. Second, the extraterritorial effects of the United States and the European Union are established by antitrust law enforcement agencies or case law, rather than from provisions of statute law. Third, both the United States and the European Union recognize the effect principle of antimonopoly law on extraterritorial application.

There are also differences between extraterritorial effects of the United States and the European Union, specifically in terms of the application principle. The application principle of U.S. extraterritorial effects is called the effect principle. However, in practice, the courts rely on the implementation of the "reasonable principle." These two principles are only slightly different. On the other hand, while the European Union recognizes the effect principle, it has been very cautious in its application. The European Court of Justice tries to avoid the "effect principle" in favor of creating new principles to resolve problems relating to the behaviors of EU enterprises in the international markets.

¹³ J. YU, STUDY ON LEGAL PROBLEMS OF MULTINATIONAL CORPORATION (1989).

IV. THE CONFLICTS CAUSED BY THE EXTRATERRITORIAL EFFECT OF ANTIMONOPOLY LAWS AND POSSIBLE SOLUTIONS

A. The Conflict of Jurisdiction

Given the principles of extraterritorial effect of antimonopoly laws discussed above, we know that most conflicts could be resolved if countries would consistently regulate the unfair competitions of multinational companies through personal jurisdiction and the principle of territory. In light of protectionism and the principle of effect, most countries apply the U.S. principle of effect to protect their own interest. In these cases, more conflicts result in the jurisdiction of antimonopoly, especially in terms of the monopolies caused by the multi-merged companies that involve several countries.

On March 13, 2006, the European Commission announced a formal antitrust investigation into the acquisition of Dutch Borg Industries Corporation (“Borg”) by China International Marine Containers Co., Ltd (“CIMC”). CIMC and Borg are the two largest manufacturers of containers for liquids in the world. The CIMC market share is over 50 percent and the company's sales were \$3.3 billion in 2004. Borg's sales revenue was EUR 235.8 million in 2004, and its 27 subordinate enterprises and branch offices are found in the Netherlands, Belgium, Denmark, Finland, Germany, Poland, and South Africa. In February 2006, CIMC established a new company by a joint venture with two controlling shareholders of Borg. The new company would acquire Borg and CIMC would receive a 75 percent stake in the new company.

Clearly, the merger of these two companies not only impacts markets in China and the Netherlands, it also indirectly impacts markets in Belgium, Denmark, Finland, Germany, Poland, and South Africa. According to the “effects principle,” these countries should have jurisdiction in this case, in addition to the European Commission. Should these countries attempt to exercise their jurisdictions? Which country should begin this legal battle? This is the type of situation that undoubtedly leads to conflict.

B. The Conflict of Lawsuit

In the case of antimonopoly, there are various obstacles in terms of the adjudicative proceedings, particularly in terms of investigation and evidence. The articles of antimonopoly law are abstract and the rules are malleable. Therefore, it becomes difficult to explain and apply these laws and ideas without specific facts from antimonopoly cases. Moreover, the collection of extraterritorial evidence against enterprises requires the cooperation of national governments. This requirement has been documented in pacts, for example, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

However, few countries are willing to cooperate in this practice and some countries have even created laws in order to avoid participating in this practice.¹⁴ For example, Great Britain issued the Shipping Contracts and Commercial Documents Bill in 1964 to forbid a lay person or a person in the legal system from providing evidence, information, or any form of help to the foreign departments of antimonopoly groups or foreign courts.

¹⁴ Z. YOUNG ECONOMIC LAW, (2000).

C. The Conflict of Right of Execution

The judicial ability of a country includes the power to create laws and the right to execute those laws. A country can create effective laws of extraterritorial effect without interference from other countries; however, other countries might object when those laws are applied and executed in the extraterritorial regions. Moreover, without the help of other countries, activities such as calling witnesses and sending legal instruments would be impossible to carry out. After the United States began carrying out the extraterritorial effect of their antitrust act, other regions such as the European Union and Germany drew on the principle of equity and applied their antitrust acts in extraterritorial regions, covering more areas than the Sherman Act.¹⁵

These countries also created antilegislation laws to provide protection from investigation and action by the U.S. courts. The uranium case is a well-known example. In this case, U.S. law enforcement of foreign cartels led to retaliatory legislation in Britain, Canada, France, Australia, and South Africa, among other countries. This legislation limited the evidence activities of the parties in these countries by creating blocking statutes, and compensated losses that their national companies suffered through clawback statutes.¹⁶ This particular case demonstrates the consequences of the conflict of execution, namely that the principles and rules of extraterritorial effects of antimonopoly law are difficult to enforce and resources are wasted by dealing with this difficulty.

D. Solution #1: Multi-level Cooperation of Jurisdiction of Antimonopoly

Given the difficulties in applying and executing the extraterritorial effects of antimonopoly laws, the function and effectiveness of these laws to protect national economies is called into question. Moreover, economic globalization and the development of multinational companies have brought about an increasing number of international monopolies and business behaviors that need to be addressed.

One solution to this problem is for countries to develop and sign mutual pacts and contracts. The European Union has been very active in terms of multilateral consultations with other entities. For example, the European Union proposed and established the competition policy group during the World Trade Organization (“WTO”) Singapore ministerial conference in 1996. The European Union is also actively preparing for negotiations to promote competition in the “Millennium Round” (Report on Competition Policy).

In 1991, the United States and the European Union signed the Pact of the Implementation of Mutual Competition Laws between America and European Community. This pact had several distinguishing features. First, it allowed for both sides to work together on cases. Second, it allowed one side to require the other side to conduct an investigation when competition behaviors hurt the interests of that side’s exporters and violated their antimonopoly laws. Third, the pact also included the principles of positive and negative comity.¹⁷

¹⁵ Huang, *supra* note 13.

¹⁶ R. Pitofsky, *Competition Policy in a Global Economy*, J. INT’L ECON. L. 403-411 (1999).

¹⁷ J. Zhang, *On the Law Blockade of EU on Extraterritorial Effect of the American Economic Law*, CHINESE J. EUR. STUDIES, 2: 55-57 (2001).

In 1998, the United States and the European Union also created the Agreement on the Implementation of Positive Comity Principles for the U.S. Government and the European Commission in the Competition Law Enforcement Process. This agreement affirmed both positive and negative comity principles.¹⁸ The positive comity principle states that a country is required to carry out law enforcement in a monopoly case in order to address any adverse impact on the interests of another country, to give full and sympathetic consideration to the case, and or take any actions that it considers appropriate. The negative comity principle states that to avoid conflict of interest between the two sides in the implementation of antimonopoly law, one side may not conduct an investigation into the other side's behavior in the antitrust laws. Together, the two principles may alleviate some of the conflict about the extraterritorial effects of antitrust law. It is therefore advisable to incorporate these principles into the signing of bilateral and multilateral treaties.

In addition, regional cooperation will also help solve these conflicts. The Unitized Law of Antimonopoly of EU Members exemplifies this type of cooperation. This law integrated the terms of the 81st and 82nd principles of the Treaty of Rome and prohibited the behaviors of restraint pacts and the abuse of control. Another example of this type of cooperation is the European Treaty of Rome that gave the power of antimonopoly laws to all of its members. The Treaty of Rome provides a compelling example of how mutual cooperation between the European Union and its members can relieve conflicts between the extraterritorial applications of the antimonopoly laws of its members.

Other regional associations such as the Association of South-East Asian Nations and the African Union should construct their regional antimonopoly legislation by mirroring what the European Union has done. The EU experience shows us that a "deep level of integration does not need a complete unity, as long as the relevant minimum standards are contained in the agreement with mutual recognition of the contracting parties. It has been enough even if it is not the best way."¹⁹

E. Solution #2: The International Legislation of Antimonopoly

The development of antimonopoly legislation throughout the world has developed along three stages: the extraterritorial application of individual countries' laws, integrated legislation of laws on a regional scale, and integrated legislation across the entire world. Each stage has experienced conflicts and resolutions.

All countries approved the international antitrust unified legislation in July 1993. Experts strongly advocate the development of an International Uniform Code that would be binding for countries involved in world trade. In this way, countries could effectively coordinate and cooperate in the area of competition policy in order to solve conflicts having to do with the extraterritorial effects of antimonopoly law. To this end, an international antitrust code working group led by Germany and the United States submitted an international antitrust code draft to the General Agreement on Tariffs and Trade Director-General. This draft was expected to

¹⁸ H.A. HERMAN & C. TONES C., FAIR TRADING IN EUROPE, KLUWER-HARRAP HANDBOOK, at 14 (1999).

¹⁹ BERNARD, HOEKMAN & M. KOSTECKI M., THE POLITICAL ECONOMY OF WORLD TRADING SYSTEM—FROM GATTO TO WTO (1999).

become a multilateral trade agreement under the framework of the WTO (World Trade Materials 1993²⁰). The draft not only established a set of international antitrust rules, but also included a dispute settlement mechanism. The draft also attempted to establish an international antitrust enforcement agency under the WTO framework to ensure that domestic antitrust laws of the Member States met the minimum standards of the international antimonopoly law. Unfortunately, the WTO did not provide any opportunity to discuss this draft and, ultimately, it was not adopted.

V. CONCLUSION

As this article discussed, there are many complex reasons behind the difficulties of international legislation of antimonopoly laws. First, antimonopoly laws are created by individual governments and often serve a social function instead of completely following civil law. International trading laws protect the autonomy of both parties implicated in the pact; therefore, it is very difficult to carry out antimonopoly laws in international regions. Second, the goals of each country's antimonopoly laws can be different, and national legal policies will differentially affect the characteristics of antimonopoly laws. Finally, the legal traditions and institutions are different for each country, which presents a serious problem for setting up international antimonopoly legislation.

Despite these difficulties, antimonopoly laws are moving forward in every country. Antimonopoly law is a way of balancing individual and collective interest and integration interests. On one hand, we should determine how much of a monopoly a society can bear. On the other hand, we should be able to regulate markets since completely free markets do not exist and antimonopoly laws should strive for a balance. Give the increasing rate of globalization and foreign trading, it is extremely important to understand and implement successful international antimonopoly laws.

²⁰ Draft International Antitrust Code, World Trade Materials 9: 5 (1993).